Ng Guat Hua v Onestoneinvest Pte Ltd and Others
[2008] SGHC 156

Case Number : Suit 146/2007

Decision Date : 19 September 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Alfred Dodwell (Clifford Law Corporation) for the plaintiff; Ong Ying Ping (Ong Tay & Partners) for the 1st and 2nd defendants; Lai Swee Fung (Unilegal LLC) for the 3rd defendant

Parties : Ng Guat Hua — Onestoneinvest Pte Ltd; Simon Pang Yap Cherng; Ng Say Kah

Restitution

19 September 2008

Lai Siu Chiu J:

1 Ng Guat Hua ("the plaintiff") sued her elder brother Ng Say Kah ("the third defendant"), Onestoneinvest Pte Ltd ("the Company') and one Simon Pang Yap Cherng ("the second defendant") over an oral agreement wherein she was to have made a capital investment of $750,000 in the Company. (I shall refer to the second and third defendants collectively as "the two defendants"). When this suit came up for hearing before Justice Woo Bih Li ("Woo J") on 12 November 2007, the parties settled the claim and a settlement agreement was signed that same day.

2 On 21 February 2008, the third defendant applied by way of Summons No. 802 of 2008 ("the defendant's application") to strike out the plaintiff's claim.

3 On her part, in Summons no. 1412 of 2008 ("the plaintiff's application") filed on 27 March 2008, the plaintiff applied for the following prayers:

(1) the settlement agreement dated 12 November 2007 be rescinded;

(2) the Order of Court dated 12 November 2007 be set aside;

(3) Suit No. 146 of 2007 be reinstated to the cause books;

(4) the defendants to pay the cost of this application; and

(5) such further and/or others as this Honourable Court deems fit.

4 Both applications came up for hearing before me; I granted the defendant's application and dismissed the plaintiff's application with costs. The plaintiff has now appealed against my decision in Civil Appeal No. 57 of 2008.

The affidavits

5 I shall refer first to the affidavit filed by the third defendant in support of the defendant's application. He deposed as follows:

(a) the action was fixed for five days' hearing before Woo J on 12 November 2007;

(b) on the first day of trial, the parties reached a settlement and a consent order of court was recorded by the judge wherein the plaintiff undertook not to file a fresh action for the money which was the subject of this action;

(c) the plaintiff was granted leave to file a notice of discontinuance on 14 November 2007;

(d) despite repeated requests including his solicitors' letter dated 14 January 2008, the plaintiff had to-date failed, refused and/or neglected to file the notice of discontinuance.

6 In her reply to the defendant's affidavit, the plaintiff prayed for the defendant's application to be dismissed. She deposed to the following facts:

(a) the Company was incorporated on 4 December 2003 with the third defendant as a director;

(b) she became acquainted with the second defendant on or about 1 June 2001 first as a patient and later as a friend after he became a friend of the third defendant;

(c) from about 2002, the second defendant frequently invited her to attend religious events which he organised;

(d) by an oral agreement made in early 2003 between herself and the Company, represented by the second and third defendants, it was agreed that in consideration of her investing in the Company, the two defendants would allot to her ⅓ of the issued shares in the Company;

(e) pursuant to the oral agreement, she invested various sums totalling $750,000 into the Company between 2003 and 2006;

(f) the two defendants promised that she would receive by August 2006 legal documentation and receipts to evidence her payments;

(g) the two defendants breached the agreement and failed to provide her with any legal documentation;

(h) that meant the two defendants may not have capitalised her investment in the Company and she may have been left with valueless shares in a worthless company;

(i) it was clear that she had been hook-winked into an elaborate scheme by the two defendants;

(j) the two defendants came up with a novel and ingenuous defence which the trial judge rejected;

(k) the trial judge noted that if she took the shares, she could probe and/or investigate into the affairs of the Company and ascertain the level of fraud perpetrated against her;

(l) the settlement agreement was to put her in the position as if the oral agreement had been performed;

(m) in the settlement agreement, the two defendants calculated that her payments would correspond to 68% of the paid-up capital in the Company entitling her to 235 of its issued shares of 377;

(n) further, the shares would correspond in date and time to her payments and correspond to proof that the sums were actually transferred and deposited into the Company's bank account;

(o) the settlement agreement envisaged that there would be proper and/or due diligence done in relation to the shares to be transferred to her. It would be totally unconscionable if she was forced into taking shares in a worthless company;

(p) despite her solicitors' request, the two defendants in particular the third defendant had refused to provide her with any information or documentation to enable her to ascertain the workability and feasibility of the settlement agreement; and

(q) she asked the court for leave to undertake the due diligence exercise.

7 I should add that in her affidavit the plaintiff set out at length the events leading up to the trial before Woo J as well as how the two defendants had set out to cheat and defraud her of the money. I have not repeated her allegations for the reason that they were not relevant to the applications at hand – the events before and leading up to the trial were academic as they were subsumed in the settlement agreement.

8 Besides the affidavits of the plaintiff and the third defendant, two other affidavits were filed for the defendant's and the plaintiff's applications. One affidavit was filed by Lim Seng Siew ("LSS") the solicitor who acted for the Company and the second defendant in the trial before Woo J, while the other affidavit was filed (on 9 April 2008) by the plaintiff's solicitor Helen Chia ("Helen").

9 In her affidavit, Helen deposed that she did not draft the settlement agreement. The terms therein were agreed to by the parties' solicitors (including herself) and she was merely tasked with writing down the terms. Her partner Nicholas Aw ('Nicholas"), who assisted her at the trial, was present. (Nicholas filed a separate affidavit to corroborate what was stated in Helen's affidavit).

10 At the time when the settlement agreement was reached, Helen said that both she and the plaintiff understood that the plaintiff's payment of $750,000 would be utilised as payment towards the Company's capital. There would be no reason for the plaintiff to settle her claim otherwise. At some point before the transfer of shares to her, the plaintiff sought confirmation that her $750,000 payment would be capital injected into the Company. To that intent and purpose, Helen wrote letters on the plaintiff's behalf to the solicitors representing the Company and the two defendants. Save for a blanket refusal from the Company, Helen deposed that to-date she had received no response from the two defendants.

11 In the following paragraphs of her affidavit, Helen deposed:

14 It was always envisaged that the shares offered by the 3rd Defendant in return of the settlement of the S$750,000 claim by the Plaintiff are not worthless shares, for otherwise it would be tantamount to being a worthless settlement that would place the Plaintiff in no better place than when she commenced the action and it would not be a settlement reached and/or entered into in good faith.

15 The above contention is further supported by the fact that despite repeated requests by the Plaintiff for the inspection of the 1st Defendant's company books for due diligence purposes, the Defendants have denied and failed to accede to the same.

16 This has caused a legitimate concern on the part of the Plaintiff that the 1st Defendant's shares could most likely be worthless and would male a mockery of the settlement agreement.

18 I confirm the contents of paragraphs 2 and 3 [of LSS's affidavit] and wish to state that the Plaintiff's position on her request for documents as described in paragraph 3 of Lim Seng Siew's 1st affidavit prior to the transfer is not that it is a condition precedent for the performance of the settlement agreement but rather to ascertain and confirm that all things were in place including but not limited to the deposit of her monies in the sum of S$750,000.00 into the 1st Defendant's account.

12 LSS disagreed with Helen and took issue with para 14 of her affidavit. In his affidavit, LSS deposed that the discussions which led to the signing of the handwritten settlement agreement took place amongst the three lawyers who acted for the parties, *viz* himself, Lai Swee Fung (acting for the third defendant) and Helen (for the plaintiff), on the premise that each solicitor spoke on behalf of his/her client without the parties being present.

13 LSS could not recall Helen having raised what the plaintiff now alleged in para 6(o) above (that there was to be proper and/or due diligence done in relation to the shares to be transferred to the plaintiff). He also could not recall Helen asking for the documents the plaintiff had requested in para 6(f) above. He said he took grave exception to the plaintiff's allegation that there had been a mistake and/or misrepresentation which implicated the defendants and made insinuations on the probity and conduct of both the Company and the second defendant, particularly when the allegation was not captured in the pleadings of this case or a separate statement of claim.

The settlement agreement

14 It would be appropriate to set out the terms of the settlement agreement at this juncture. They were:

By consent

1 The plaintiff shall discontinue the action herein in Suit No. 146 of 2007 with no liberty to file afresh;

2 No order as to costs;

3 Ng Say Kah the 3rd defendant shall transfer 235 shares of par value $1,000 each to the plaintiff within fourteen (14) days from the date of the settlement;

4 that the terms of the settlement agreement shall be private and confidential by all parties involved and by parties whether directly or indirectly involved.

The pleadings

15 It would also be appropriate at this juncture to look at the plaintiff's pleadings. In her statement of claim, the plaintiff (who is a medical practitioner) described the Company's business as that of brokering in securities, investments, commodities and financial options. The two defendants were officers of the Company. The plaintiff then narrated the facts set out in para 6(b) to (h) above. She alleged that the two defendants made false representations to induce her to invest $750,000 in the Company. As a result, she had suffered loss and damage. She claimed the sum of $750,000 from

the Company and the two defendants.

16 In the joint defence of the Company and the second defendant as well as in the separate defence filed by the third defendant, the Company and the two defendants *inter alia* denied the plaintiff's allegations as well as her alleged loss and damage. The Company and the second defendant averred that if the third defendant made any representations or promises to the plaintiff, he had done so in his own personal capacity and not as a representative of the Company. They had no knowledge of what the third defendant said to the plaintiff.

17 The third defendant pointed out that, in any case, there could not have been an oral agreement reached in early 2003 when the Company was only incorporated on 5 December 2003. He had introduced the second defendant, a former banker, to the plaintiff in or about December 2002 or early 2003 and the relationship between the second defendant and the plaintiff was strictly that of a patient-doctor. There was no and could not have been any, discussion of the plaintiff investing in the Company as the plaintiff alleged when the idea of incorporating the Company had not even been mooted.

18 It would again be unnecessary to consider the defendants' defences in further detail because of the settlement agreement.

The submissions

19 I turn next to the submissions of the parties. Not surprisingly, the Company and the two defendants were aligned in their arguments that the defendant's application should be allowed and the plaintiff's application should conversely be dismissed. Counsel for the plaintiff presented the opposite submissions.

The plaintiff's submissions

20 The plaintiff's arguments dwelt at length on the facts leading up to her claim in this suit. She alleged that at the hearing before Woo J on 12 November 2007, it was agreed between the parties and acknowledged that the plaintiff's monies were paid as investments into the Company. It was on that premise that the defendants departed from their defence(s) and agreed that by virtue of the plaintiff's investments into the Company, the third defendant would transfer his shares to the plaintiff.

21 The assumption then of the plaintiff whether unilateral or otherwise, which induced her to enter into this settlement agreement, was clearly based on the mistaken belief that her monies were paid into the Company and it would be so invested. She had no other basis to settle the matter. As such, the plaintiff would have no reason to enter into a compromise settlement that would detract from her contentions as set out in her pleadings, for the failure to provide the documentation she had requested went to the very core of the matter, that the monies were not invested into the Company. Otherwise, it would be fraud on the plaintiff as she would have been cheated of paying over $750,000 and not having it used for the purpose for which it was paid over.

22 As such, the plaintiff entered into the settlement agreement with the defendants on a mistaken apprehension as to her relative rights, i.e. she was operating under a mistake of law and fact. It was envisaged that if there was to be a transfer of shares in consideration of the $750,000 paid by the plaintiff, a logical and legitimate expectation was that there would be proper and/or due diligence performed in relation to the shares to be transferred so that the settlement agreement would be a bona fide settlement which would not defeat the interests of justice.

23 Counsel for the plaintiff argued that the cases *Ong & Co Pte Ltd v Ong Choon Huat Watson* [1994] 1 SLR 491and *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd* [1991] SLR 769 could be distinguished in this regard. She urged the court to follow instead the Malaysian decision in *Phuah Beng Chooi @ Koh Kim Kee & Ors v Koh Heng Jin @ Koh Heng Leong & Ors* [2007] 2 MLJ 458 and, under its inherent jurisdiction, to vary, modify or even extend its own order so as to express its intention and meaning correctly in order to ensure that the purposes of justice are not defeated.

The defendants' arguments

24 Counsel for the third defendant pointed out that the plaintiff's affidavit, highlighted at [6] above, raised extrinsic matters that were inadmissible and which were to be excluded under s 96 of the Evidence Act (Cap 97, Rev 1997 edn) (citing *Tan Hock Keng v L&M Group Investments Ltd* [2001] 4 SLR 428). The terms of the settlement agreement were plain and unambiguous, in particular clause 1 at [14] above. The document was drafted by lawyers in court in the midst of legal proceedings and duly signed by the parties prior to being tabled before the trial judge. The plaintiff already had had her day in court – what more did she expect the court and the defendants to do?

25 Counsel for the Company and the second defendant attacked the plaintiff's application as misconceived. The correct course of action would have been for the plaintiff to assert her rights pertaining to the settlement agreement by commencing a fresh action. Reliance was placed on extracts from *The Law and Practice of Compromise* by David Foskett (Sweet & Maxwell, 6th edition 2005). At page 116 para 6-20 the learned author stated:

> A judgment or order by consent is binding until set aside. Fresh proceedings must be commenced if it is sought to set aside a final judgment or order by consent.

The learned author added at page 207 para 12-02:

> The procedure for seeking a judicial rescission of a compromise agreement is identical to that required in relation to any other contract. A fresh action is needed seeking an order setting aside the agreement with consequential directions.

Then at page 85 para 5-10 of the same text, it was said:

> ……It is established law that in order to determine the common intention of the parties to an agreement reduced to writing, whether purely as a written contract or as an agreement embodied in a consent order or judgment, the intention of the parties must be construed by reference to the document or order itself; extrinsic evidence of what may or may not have been in the minds of the parties at the time of their agreement is not admissible for this purpose.

26 The two parties also took issue with the plaintiff's application on another ground – it was incorrect to apply to a high court judge to set aside a consent order made by another judge of coordinate jurisdiction, citing *Poh Soon Kiat v Hotel Ramada Nevada trading as Tropicana Resort & Casino* [1999] 4 SLR 391.

27 It was noteworthy that in her affidavit filed in support of the plaintiff's application, the plaintiff gave no explanation for her silence between 12 November 2007 and 14 December 2007, when her lawyers raised for the first time to the third defendant's solicitors the issue of due diligence and requested copies of ten items of documents relating to the Company. The third defendant's solicitors replied to say the request was an afterthought as it was never raised in the course of negotiations.

28 It was further pointed out that the plaintiff's claim was for a refund of her invested sums of $750,000. How then could it be envisaged that there was to be a proper and/or due diligence done in relation to the shares to be transferred to her? Transfer of shares to the plaintiff was the settlement the parties agreed to in lieu of but it was never part of, the plaintiff's claim.

The decision

29 When I inquired of counsel for the plaintiff, he did not deny what had been stated in the third defendant's affidavit (at [5]) filed in support of the defendant's application. That being the case, the only issue the court had to determine was whether the plaintiff was precluded by the settlement agreement from raising/imposing new conditions for the implementation of its terms. I was of the view that the plaintiff could not, based on the law as encapsulated in some of the authorities cited by the parties.

30 Counsel for the plaintiff had sought to distinguish my decision in *Ong & Co Pte Ltd v Ong Choon Huat Watson* (*supra* [23]). There, the plaintiffs had sued the defendant for a declaration that the transfer of a country club membership by the plaintiffs' judgment debtor Christopher Chua ("Chua") to the defendant was void and that the membership was held in trust for them by the defendant. A settlement was reached whereby the plaintiffs agreed to relinquish their claim in consideration for an agreed sum. Before the agreed sum was paid up, Chua was adjudged a bankrupt. The country club then informed the defendant that under its rules, Chua had ceased to be a member upon his bankruptcy. Accordingly, Chua's conversion of his membership to a transferable one and his subsequent transfer to the defendant was of no effect. The defendant applied to set aside the settlement agreement while the plaintiffs brought proceedings to enforce the settlement.

31 I had there dismissed the plaintiffs' claim and held that whilst a court would normally not look behind a settlement reached bona fide between the parties, where there was a misapprehension of fact which went to the root of the compromise, shared by both parties, it would vitiate the agreement. Since the existence of the club membership was fundamental to the settlement reached between the parties, the agreement would be set side.

32 The earlier case *Chai Chung Ching Chester & Others v Diversey (Far East) Pte Ltd* (*supra* [23]) also concerned a settlement agreement reached prior to trial (in a suit taken out by the defendants) between the parties most of which terms were recorded in a consent order of court. The defendants sought to argue subsequently that the settlement agreement was ambiguous in that their entitlement to costs did not specify whether fees they had paid to accountants and other professionals were covered thereunder. They attempted to introduce extrinsic evidence leading up to the settlement agreement to resolve the dispute with the plaintiffs. The court held that the settlement agreement was clear and unambiguous and in the absence of evidence of a common mistake, the court would not rectify the agreement.

33 Counsel for the plaintiff did not elaborate on how the above two cases could be distinguished from the present. In the absence of such submissions, I did not accept that the two authorities were not applicable. It bears noting that the terms of the settlement agreement at [14] are clear and unambiguous. There was therefore no basis for the introduction of extrinsic evidence to clarify or to elaborate on the factual matrix that led to, the terms. Above all, the settlement terms were negotiated by the three firms of solicitors acting for all the parties. I cannot imagine that the plaintiff would not have told her counsel that the transfer of shares to her was subject to a satisfactory due diligence exercise being first conducted on the Company, if indeed that was her pre-condition to accepting 235 shares instead of a refund of the $750,000 she had invested, in the Company.

34 The plaintiff had argued (at [22]) that she had entered into the settlement agreement with the Company and the two defendants under a mistake of law and fact due to a misapprehension of her rights. As a general rule, money paid under a mistake as to the general law, or as to the legal effect of the circumstances under which it is paid, but with full knowledge of the facts was irrecoverable (see *Chitty on Contracts* Sweet & Maxwell , 29th edition 2004 Volume 1 p 1656 para 29-040).

35 Before a court will set aside a settlement agreement on the ground of a mistake of fact, it must be a common mistake that nullifies consent. If it is an operative mistake, the settlement agreement is said to be void *ab initio.* In this case, the plaintiff did not claim the "mistake" was a common mistake. Nowhere in the plaintiff's affidavit or in the affidavit of Helen (or for that matter that of Nicholas) was there mention that the alleged mistake was shared by the Company and/or the two defendants. Instead, her counsel's submissions (at [22]) made it clear that the mistake, if indeed there was one, was a unilateral mistake on the part of the plaintiff.

36 At law, not all unilateral mistakes will be operative and affect the terms of a contract. A mistake as to the terms of the contract if known to the other party may affect the contract. Further, it is not sufficient that one party knows the other has entered the contract under a mistake of some kind. *The mistake must relate to the terms of the contract.* If it relates, for example, to what is the subject-matter that is being bought and sold, the mistake is as to the terms and may prevent there being a contract; but if the mistake is merely to the quality or the substance of the thing contracted for, it will be an error in motive and it is well established that an error in motive will not avoid a contract (see *Chitty on Contracts* [34] *supra* at p 403-405 para 5-063 and 5-065). Consequently, the unilateral mistake made by the plaintiff would not suffice to set aside the settlement agreement. She knew shares in the Company would be transferred to her; she unilaterally thought the transfer was conditional on a satisfactory due diligence exercise being carried out on the Company. That condition did not affect the transfer of the shares to her.

37 In any event, the plaintiff's application failed *in limine* as she should have commenced fresh proceedings to set aside the settlement agreement. The proceedings herein were spent even if they were not discontinued, once the settlement agreement was signed and recorded by Woo J. It therefore served no purpose for the plaintiff to resurrect what took place before the trial judge.

38 I accepted the arguments of counsel for the two defendants and the Company that the plaintiff had given no valid grounds why she should not be held to her end of the bargain, *viz* in exchange for the unconditional transfer to her of 235 shares in the Company by the third defendant, she was to discontinue this suit.

39 As there were no merits to the plaintiff's application I dismissed it. In turn, I granted the defendant's application to enforce the settlement agreement.